

No. 15245

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

HENRY W. MATTHEWS and NETTIE MATTHEWS, Doing Business Under the Firm Name and Style of Yuba Livestock Auction Company,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California
Northern Division.

FILED

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PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Northern District of California, Northern Division

Civil No. 7124

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY W. MATTHEWS and NETTIE MATTHEWS, Doing Business Under the Firm Name and Style of YUBA CITY LIVESTOCK AUCTION COMPANY,

Defendants.

COMPLAINT FOR CONVERSION OF STOCK MORTGAGED TO FARMERS HOME ADMINISTRATION

Comes Now the United States of America and complains of the defendants and for cause of action alleges:

I.

That this is a suit of a civil nature brought by the United States of America, and jurisdiction of this Court arises under the provisions of Section 1345 of Title 28 of the United States Code.

II.

That defendants reside in the Northern Division of the Northern District of California within the jurisdiction of this court; and that at all times referred to in this complaint defendants did business in the Northern Division of the Northern

District of California, operating a livestock auction company under the firm name and style of Yuba City Livestock Auction Company.

III.

That a crop and chattel mortgage was executed to plaintiff for value by one Allan W. Wheaton, hereinafter referred to as mortgagor; that said mortgage was dated March 17, 1951, and was recorded on March 17, 1951, in Volume 158, page 353, Official Records of Yuba County, California; that said mortgage covered certain livestock, therein described, and also contained a clause making it applicable to all livestock then owned or which might be thereafter acquired by the mortgagor during the time the mortgage was effective; and that said mortgage provided that the mortgagor should not sell the mortgaged property without the written consent of the mortgagee and provided further that if the mortgagor should fail to comply with any of the mortgage covenants the mortgagee might foreclose the mortgage immediately by taking possession of the mortgaged property and selling the same at private sale or at public auction and applying the proceeds against the indebtedness secured by the mortgage.

IV.

That between the dates of November 19, 1951, and March 2, 1953, inclusive, said mortgagor, in total disregard of the mortgage described in paragraph III hereinabove, wrongfully and fraudulent trans-

ferred and delivered to defendants certain livestock hereinafter described, which livestock was covered by said mortgage; that defendants, likewise in total disregard of said mortgage, wrongfully marketed said heifers through their livestock auction yard, thereby converting said livestock to their own use and purposes; and that said livestock, the value thereof, and the dates of each sale are shown in the following table:

Date	Description	Weight In Pounds	Net Sales Price
11-19-51	3 red butcher hogs	640	\$ 111.74
11-26-51	1 Guernsey cow	276.07
12- 3-51	1 Guernsey cow	280.92
8-25-52	3 feeder pigs	27.64
9- 8-52	3 fat hogs	505	97.97
9-29-52	1 red sow	} 485	} 103.67
	1 red fat hog		
	1 lamb		
10 -6-52	3 fat hogs	585	119.16
10-13-52	2 fat hogs	340	59.36
11- 3-52	1 large sow	} 215	} 87.45
	1 fat hog		
11-10-52	1 red butcher stag	400	36.86
2- 2-53	5 fat hogs	920	183.83
3- 2-53	2 fat hogs	} 410	} 141.55
	1 red sow		
Total			\$1,526.22

V.

That by reason of said wrongful and fraudulent transfer and delivery of said livestock by said mortgagor to the defendants, plaintiff became entitled to the immediate possession of said livestock and

was entitled to sell such livestock at private sale or at public auction and apply the proceeds in discharge of the indebtedness secured by the above-described mortgage.

VI.

That plaintiff has never released its lien on the above-described livestock nor has it ever consented to the sale of said livestock by said mortgagor.

VII.

That no part of the proceeds of the sale of said livestock was paid to the plaintiff to be applied on the indebtedness secured by the aforesaid mortgage; and that there is still owing to plaintiff on the account of said mortgagors an amount in excess of the value of the livestock converted by defendants and that mortgagor does not have sufficient assets to repay said indebtedness.

VIII.

That demand has been made by the plaintiff upon the defendants for the payment of the value of the aforesaid converted livestock, but that to date defendants have failed and refused to reimburse the plaintiff.

Wherefore, plaintiff prays that judgment be entered against said defendants for the sum of One Thousand Five Hundred Twenty-six and 22/100 (\$1,526.22), plus interest since the dates of conversion, and for costs of this action, and plaintiff prays

for such other and further relief as to this Court may seem just and proper.

LLOYD H. BURKE,
United States Attorney;

By /s/ JAMES S. EDDY,
Assistant U. S. Attorney.

[Endorsed]: Filed September 30, 1954.

[Title of District Court and Cause.]

AMENDED ANSWER

Now Come the Defendants, Henry W. Matthews and Nettie Matthews, doing business under the firm name and style of Yuba City Livestock Auction Company, and in answer to the complaint admit, deny and allege as follows:

I.

Answering Paragraph III, Defendants admit the allegations contained in said paragraph down to and including the word "described" in line 8, and admit that portion commencing with the word "and" in line 11 and continuing thence to the end of said paragraph.

Answering the intermediate portion of said paragraph, that is to say, the portion commencing with the word "and" in line 8 and ending with the word "effective" in line 11, Defendants admit that Plaintiff's chattel mortgage contained a provision pur-

porting to make it applicable to all livestock then owned or which might thereafter be acquired by mortgagor during the time Plaintiff's said mortgage was effective, but deny that said provision was or is legally sufficient or enforceable; and allege in this connection that following the recordation of Plaintiff's said mortgage, the mortgagor, A. W. Wheaton, gave to one Fritz Ruff a chattel mortgage on 150 pigs, including 19 sows and the natural increase thereof, all located in Yuba County, which said mortgage was a purchase money mortgage and was recorded in Volume 158 of Official Records at page 23, Yuba County Records, on November 5, 1951; that said last-mentioned mortgage was in effect throughout the entire period of livestock sales made by Defendants for said mortgagor and complained of by Plaintiff in its complaint herein.

II.

Answering Paragraph IV, Defendants allege that they have no knowledge or information sufficient to form a belief as to the truth of the initial averments thereof extending down to and including the word "mortgage" in line 24; deny that portion reading as follows: "that Defendants likewise, in total disregard of said mortgage, wrongfully marketed said heifers through their livestock auction yard, thereby converting said livestock to their own use and purposes"; admit that Defendants made the livestock sales listed in the table which forms the concluding portion of said paragraph.

III.

Answering Paragraph V, Defendants deny any wrongful or fraudulent act on their part as stated in the first and second lines of said paragraph; allege that they have no knowledge or information sufficient to form a belief as to the truth of the remainder of said paragraph.

IV.

Answering Paragraph VI, Defendants allege that they have no knowledge or information sufficient to form a belief as to the truth of said paragraph.

V.

Answering Paragraph VII, Defendants deny that they converted any livestock to Plaintiff's detriment as alleged in the 5th line of said paragraph; allege that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

VI.

Answering Paragraph VIII, deny that the livestock were converted by Defendants as alleged in the second line of said paragraph; admit the remaining allegations contained in said paragraph.

Further Answering Said Complaint, Defendants allege that upon the written, signed authorization and request of mortgagor, wherein he expressly declared and guaranteed to Defendants that the livestock in question were free and clear of all liens, mortgages or other encumbrances, they sold in good

faith through the facilities of their licensed auction yard, situated at Yuba City, in the County of Sutter, the livestock listed and described in Paragraph IV of the complaint without notice of Plaintiff's chattel mortgage or claim thereon; that Defendants deducted and retained their regular commission of three (3%) per cent on the gross sales and their actual and necessary sales expenses, remitting the net returns to A. W. Wheaton.

By Way of Further Answer, Defendants allege that the complaint fails to state a claim against Defendants upon which relief can be granted.

Wherefore, Defendants pray that this action be dismissed and that they have their costs incurred herein.

WEIS & WEIS,

By /s/ ALVIN WEIS,

Attorneys for Defendants.

Duly verified.

[Endorsed]: Filed April 25, 1955.

[Title of District Court and Cause.]

OPINION

Murphy, District Judge.

This is an action for conversion brought by the United States against Henry W. Matthews and Nettie Matthews, doing business as Yuba City Live-

stock and Auction Company. Jurisdiction is derived from 28 U.S.C. 1345.

On March 17, 1951, one Wheaton executed a crop and chattel mortgage to the Farmer's Home Administration, an agency of the plaintiff. The mortgage covered farm implements, machinery, and certain livestock specifically listed, as well as after-acquired livestock and property. It contained the usual provision that upon default, the mortgagee was entitled to immediate possession of the mortgaged goods. The mortgage was duly recorded on March 17, 1951, in Yuba County, the county in which Wheaton then resided and in which the property in question was then located.

On November 19, 1951, Wheaton defaulted on his obligations to the plaintiff and remained in default from that date until March 2, 1953. During the period in which he was in default, November 19, 1951, to March 2, 1953, Wheaton fraudulently removed, from time to time, certain of the livestock mortgaged to plaintiff and took them to Sutter County, where the defendants' business is located. Wheaton there had defendants sell the livestock at auction in the regular course of their business and turn the proceeds, less commission, over to him. Defendants did so, after obtaining Wheaton's signed assurance and warranty that the animals were free and clear of all liens or other encumbrances, including mortgages. There is no question regarding defendants' state of mind. They at no time during the relevant period had knowledge of plaintiff's

claim or interest in the livestock. Nor is there any question of negligence by reason of facts which might have alerted them to the possibility that the goods were mortgaged to the plaintiff.

Defendants sold the animals for a total of \$1,526.22. From this sum, they subtracted their regular sales commission of 3% plus all expenses of the sale, and turned the net proceeds over to Wheaton.

On September 30, 1954, the United States brought this action for conversion against the defendants. The question presented is whether an auctioneer is liable in conversion to a mortgagee with a right to possession, where the auctioneer without knowledge of the mortgage in default, and in the absence of other facts which would alarm the reasonably prudent man to such a state of the title, sells goods presented to him in the ordinary course of business by the mortgagor in possession, and turns the proceeds over to that mortgagor.

The cases are quite numerous which have held auctioneers liable in conversion for selling mortgaged or stolen property, but only a few deal with the precise issue here presented. In considering that issue, therefore, we must leave aside the cases holding the auctioneer liable for selling the mortgaged or stolen goods with knowledge of the interest of the true owner in the goods, such as *Dixie Stock Yard v. Ferguson*, 192 Miss. 166, 4 So. 2d 724 (1941); *Green v. Crye*, 158 Tenn. 109, 11 S.W. 2d

869 (1928), and *Forbush v. San Diego Fruit & Produce Co.*, 46 Idaho 331, 266 P. 659 (1928). In cases such as those, the rationale of the rule holding the auctioneer liable is easy to perceive and eminently just. Once the auctioneer is informed that the title in the property he is about to sell is in dispute, he acts at his peril in persisting in the sale. If he pays the proceeds to the wrong party after having been alerted to the disputed ownership, he should undoubtedly be held liable to the rightful owner. That principle was all that was involved in those cases. Whatever else may have been said there on either side of the question now before the court was dictum only.

Plaintiff further contends that the defendants in the case at bar had "constructive notice" from the proper recordation of the mortgage, and should therefore be held liable. This argument is entirely unfounded. The effect of recordation statutes of the type of that here involved, Cal. Civ. Code sec. 2957, is clearly limited to purchasers and creditors or other encumbrances, and has been held uniformly not to be applicable to auctioneers without a property interest in the goods. *First National Bank of Pipestone v. Siman et al.*, 65 S. D. 118, 275 N. W. 347 (1937); *Frizzell v. Rundle*, 88 Tenn. 396, 12 S. W. 918 (1890); *Greer v. Newland*, 70 Kan. 315, 78 P. 835 (1904); *Kearney v. Clutton*, 101 Mich. 106, 59 N. W. 419 (1894). The California cases, discussed below, do not even trouble to refute the suggestion of "constructive notice" to an otherwise innocent auctioneer on the basis of the recording

of a mortgage. The fact of recording, therefore, is irrelevant to our inquiry, and does not require further discussion.

We come now to the cases directly in point, holding the auctioneer liable in conversion although his payment of the proceeds to the mortgagor in possession was innocent and reasonable. The latest of these that has been found is *First National Bank of Pipestone v. Siman, et al.*, 65 S. D. 118, 275 N. W. 347 (1937). In that case, commission merchants sold sheep in the course of their business, and paid the proceeds over to the mortgagee, unaware that the mortgage was in default. They were held liable in conversion to the mortgagee. The court cited, as does the plaintiff here, the Restatement of Agency, Section 349 of which reads as follows:

“An agent who does acts which would otherwise constitute conversion of a chattel is not relieved from liability by the fact that he acts on account of his principal and reasonably, although mistakenly, believes that the principal is entitled to possession of the chattels.”

The court then cites (at 275 N. W. 349) a number of cases in support of the application of this principle to auctioneers without notice. The cited cases include *Greer v. Newland*, 70 Kan. 310, 77 P. 98 (1904), and *Forbush v. San Diego Fruit & Produce Co.*, 46 Idaho 231, 266 P. 659 (1928). The citation in the *Greer* case refers to the first hearing of that case in the highest court of Kansas. It was an

action in contract, not in conversion, and the auctioneers were held liable on the ground that they had had "constructive notice" by reason of the recording of the mortgage. On rehearing, 70 Kan. 315, 78 P. 835 (1904), the court held that there was no "constructive notice," and that the auctioneers could not be liable under the theory of contract, in any event. It reversed and remanded the case below. No subsequent decision is recorded. The Forbush case involved notice to the auctioneer, thus taking it out of the class of cases dealing with the principle contended for now, and raised a further question as to the interest of the auctioneers in the property itself, the court saying that the auctioneers had a status with respect to the property "not that of a mere commission merchant." (266 P. 664.)

Of the other cases cited by the court, a number squarely support the rule contended for by plaintiff here. *Kearney v. Clutton*, 101 Mich. 106, 59 N. W. 419 (1849), holds an innocent auctioneer liable in conversion, pointing out that the auctioneer may protect himself against such liability by requiring indemnity from the seller. *Robinson v. Bird*, 158 Mass. 357, 33 N. E. 391 (1893), holds an innocent auctioneer liable, without discussion. *Sprights v. Hawley*, 39 N. Y. 441, 100 Am. Dec. 452 (1868), holds the auctioneer liable as an agent of a converter, assisting in the conversion. *Wing v. Milliken*, 91 Me. 387, 40 A. 138 (1896), is a more doubtful case, for the reason that the defendant there may have been something more than an auctioneer or

commission merchant acting in the regular course of his business.

Many of the cases holding the innocent auctioneer liable make reference to the early New York case of *Hoffman v. Carow*, 22 Wend. 285 (N. Y. 1839). That interesting case, dealing with the liability in conversion of an innocent auctioneer, for the sale of stolen goods, was decided by a vote of fifteen Senators and the Chancellor against the votes of five Senators. Three opinions were written for the majority, holding the auctioneer liable although innocent. The Chancellor's opinion, at 22 Wend. 293, treated the case as one of the rights of true owner and purchaser in stolen property, and showed that under the English law the doctrine of market overt did not bar a suit to recover stolen property from the innocent purchaser. Senator Edwards, also for the majority, seemed to assume that to hold for the auctioneer would be to deprive the rightful owner of his remedies against all others, including the purchaser, again under the doctrine of market overt. See 22 Wend. 295. Senator Verplanck, for the majority still, agrees that when the handling of the goods in question is done by "mere agents," it would be unjust to impose liability upon the "common carriers, ship masters and others, through whose hands goods feloniously or wrongfully obtained might pass." He then distinguishes the case under consideration by pointing out that the auctioneer performs the act which is the conversion of the goods into money, and that therefore he should be liable.

Thereupon, Senator Verplanck puts forward the theory which has become the modern rationalization of the rule, despite its conceded harshness:

“In this instance the rule falls hardly upon innocent and honorable men; but looking to general considerations of legal policy, I cannot conceive a more salutary regulation than that of obliging the auctioneer to look well to the title of the goods which he sells, and in case of feloniously obtained property, to hold him responsible to the buyer or the true owner, as the one or the other may happen to suffer. Were our law otherwise in this respect, it would afford a facility for the sale of stolen or feloniously obtained goods, which could be remedied in no way so effectually as by a statute regulating sales at auction, on the principles of the law as we now hold it.” 22 Wend. 319, 320.

The minority in Hoffman was represented by a vigorous dissent by Senator Furman. After examining the precedents upon which the majority rely and pointing out that they do not extend to the case of an auctioneer entirely innocent of knowledge, Senator Furman examines the policy reasons tendered by Senator Verplanck, and comes out at an opposite conclusion. He warns that the doctrine of the majority would tend to destroy the useful function rendered by auctioneers to the community of farmers and planters. 22 Wend. 307. He further challenges the proposition that the auctioneer plays a

role so vital to the conversion of the property as to require his liability, saying:

“The only ground upon which a party should be held liable, is that he has the property or its value in his possession, or has with knowledge or under notice, illegally disposed of it; and not by reason of having been the mere conduit for its transmission from one to another, and that without notice or knowledge of any claim having been set up to the property by a third person.” 22 Wend. 308.

“An auctioneer does not claim the goods as his own, or assume any right in or over or to dispose of the same as his own property. It is true he has a special interest in goods sent to him to be sold, and a lien on them, or their proceeds, for duty payable to the State; he may sue the buyer for the purchase money; and is responsible to the vendee for the fulfillment of the contract of sale unless he discloses the name of his principal at the time of sale; yet, for all other purposes, he is the mere agent for the transmission of goods from one set of traders to another.” 22 Wend. 313.

Senator Furman also points to the injustice of imposing liability upon persons who are without fault or moral blameworthiness, arguing that the element of intent, or scienter, should be considered in this situation as it is in other areas of the common law, such as fraud. 22 Wend. 313.

The basic considerations of policy put forward by Senator Verplanck, for liability, and by Senator Furman, against it, have continued to be the points of subsequent discussion and decisions. The rule imposing liability was rejected first in *Frizzell v. Rundle*, 88 Tenn. 396, 12 S. W. 918 (1890). It has been vigorously criticized by an able commentator, who points out that it is anomalous to relieve from liability for accidental personal injury, caused without culpability, but to impose liability for accidental injury to property, also caused, or contributed to, without culpability. See 15 Harv. L. Rev. 335, 346 (1902). In addition to *Frizzell*, *supra*, a number of other states seem to have adopted Senator Furman's argument in dissent as the law of the case. See *Dixie Stock Yard v. Ferguson*, 192 Miss. 166, 4 So. 2d 724 (1941), (approving *Frizzell*, at 727, but decided on the issue of actual notice), and *cf.* *Leuthold v. Fairchild*, 35 Minn. 99, 27 N. W. 503 (1886). It may be said, in order to satisfy the Restatement, that the auctioneers in these jurisdictions are not agents of the seller for the purpose of the conversion, although they are his agents for certain other purposes. Such a restatement of the Restatement would serve only to point up the inevitable inadequacy of a single general rule to encompass the many underlying considerations involved in the issue of the auctioneer's liability.

The considerations against liability are the usefulness of the auctioneer's function, the heavy burdens involved in holding him to a search of the

seller's title, and his moral blamelessness under our set of facts. The considerations for liability are the degree of his participation in the wrongful disposition of the property, and his opportunity to act as an investigator of the seller's title. At bottom, what the jurisdictions which have rejected liability have done, is to weigh these competing considerations and decide that those against liability are the stronger ones.

On the part of the jurisdictions imposing liability, it is said in mitigation of the harshness of the rule, that the auctioneer can protect himself by checking the records of the place of origin of the property. If the auctioneer's fee were to reflect that burden, however, a substantial change in the size of the commission disclosed here would be necessary. And this would put the auctioneer at the mercy of the seller who lies to him as to the place of origin, or at the least require further investigation as to that question. It is said that the auctioneer can require indemnity of the seller, and thus protect himself. This does not strike a wholly convincing note. If the indemnity of the wrongful seller were worth anything, the auctioneer would not in most cases be in court. The rule imposing liability upon the auctioneer, viewed realistically, does more than shift the burden of suing the original wrongdoer from the true owner to the auctioneer. In effect, it shifts the loss to the auctioneer. It may be thought necessary, as a matter of policy, to add to the existing remedies of the true owner an action in conversion against the innocent

middleman. Such a rule is not without reason, but it should be adopted, if at all, with a full realization of its effects.

The California courts, after initially exempting the innocent auctioneer from liability in *Rogers v. Huie*, 2 Cal. 571, 56 Am. Dec. 363 (1852), have reversed their stand, and now would, without much doubt, hold the auctioneer at bar here liable. *Swim v. Wilson*, 90 Cal. 126 (1891)¹; *Lusitanian-American Development Company v. Seaboard Dairy Credit Corp.*, 1 C. 2d 121, 34 P. 2d 139 (1934).

If this case were here under diversity jurisdiction, it would end with the above conclusion, under the rule of *Erie v. Tompkins*, 304 U.S. 64 (1934). This case is here, however, by virtue of the jurisdiction of the federal district courts over cases in which the United States is a party. 28 U.S.C. 1345. The plaintiff is in this court pursuant to its authority to sue and be sued under 7 U.S.C. 1014, establish-

¹In *Swim v. Wilson*, 90 Cal. 126 (1891), the Court announced that the *Rogers* case had been "practically" overruled by the case of *Cerkel v. Waterman*, 63 Cal. 34 (1883). That case involved commission merchants who had been charged to sell the barley of one Wilson. By mistake, they also sold wheat belonging to the plaintiff and paid the proceeds to Wilson. As a matter of negligence, or contract, it may be clear that one man's wheat is not another's barley. It does not appear necessary, however, to import that undoubted proposition into the issue now under consideration. The Court in the *Swim* case went on to say that the *Rogers* case was in any event opposed to the weight of authority and principle. 90 Cal. 126, at 131.

ing the Farmers' Home Corporation. Under these circumstances, the law governing plaintiff's action is the common law prevailing in the federal courts when no choice of state law is indicated by Congress. *Clearfield Trust Company v. United States*, 318 U.S. 363 (1943). In *Clearfield*, a federal district court sitting in Pennsylvania had applied a Pennsylvania rule of laches to deny relief to the plaintiff, the United States, suing on some commercial paper. The Court of Appeals for the Third Circuit reversed, on the ground that *Erie v. Tompkins* did not apply. 130 F. 2d 93 (3d Cir. 1942). On appeal to the Supreme Court, Mr. Justice Douglas, speaking for a unanimous Court² said:

“We agree with the Circuit Court of Appeals that the rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64, does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. This check was issued for services performed under the Federal Emergency Relief Act of 1935, 49 Stat. 115, 15 U.S.C. secs. 721-728. The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of

²Only seven members sat. Messrs. Justices Murphy and Rutledge did not participate in the case.

Pennsylvania or of any other state. * * * The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources. * * * In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards. * * *”

This doctrine of the federal common law is amply supported by authority. *Deitrick v. Greaney*, 309 U.S. 190 (1940); *Board of County Commissioners v. United States*, 308 U.S. 343 (1939); *D’Oench Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447 (1942). In the *D’Oench* case, Mr. Justice Jackson, in an illuminating concurring opinion, said:

“A federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state. Federal law is no juridical chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of the venue statutes. It is found in the federal Constitution, statutes, or common law. Federal common law implements the federal Constitution and statutes, and is condi-

tioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision to cases such as the present * * *”

“The law which we apply to this case consists of principles of established credit in jurisprudence, selected by us because they are appropriate to effectuate the policy of the governing Act. The Corporation was created and financed in part by the United States to bolster the entire banking and credit structure. The Corporation did not simply step into the private shoes of local banks.” At p. 472.

It is true that Mr. Justice Jackson, in discussing the basis of jurisdiction in the D’Oench case pointed out that the statute creating the Federal Deposit Insurance Corporation, the federal agency involved in that case, contained a clause not found in the creating statute of the plaintiff now at bar, to the effect that all suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States. 12 U.S.C. 264(j). But he took care to say:

“This is not to suggest, however, that questions not specifically dealt with in these statutes cannot be federal questions simply because of the absence of an express provision that suits ‘shall be deemed to arise under the laws of the United States.’ ” 315 U.S. 684, n. 5

If this suit were being brought in Tennessee, on the basis of the mortgage held by the Farmers' Home Corporation, and the defendant there sought to evade liability under some local theory of defense, he could not prevail if that local theory were at variance with the law of the United States as developed in the federal courts in non-diversity cases. The case is here to be determined, therefore, under the federal common law.

The federal case in point is *Drover's Cattle Loan & Investment Company v. Rice*, 10 F. 2d 510 (N. D. Iowa 1926), a diversity case before *Erie v. Tompkins*, and therefore governed by the rule of *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865 (1840), under which the federal courts were not bound to follow the judicial law of the States, and developed a body of federal decisional law. The rules of decision applicable in diversity cases under *Swift v. Tyson*, therefore, are the same as those applicable to non-diversity cases in the federal courts under *Erie v. Tompkins*, at least for present purposes. In *Drover's Cattle Loan & Investment Co. v. Rice*, Judge Scott carefully examined the precedents cited on both sides of the precise issue now under consideration, the innocent sale of mortgaged cattle by an auctioneer, and concluded that the rule of *Frizzell v. Rundle*, rejecting the auctioneer's liability, was the better rule. The opinion is predominantly concerned with the issue of "constructive notice," but Judge Scott specifically considers the rule of strict liability contended for by plaintiff here when he says:

“Some cases cited proceed upon the theory that a mortgagor in possession, who sells the property, assumes the attitude of a thief, and that anyone meddling with the property in connection with the mortgagor assumes the same liability as though dealing with a thief. This principle, of course, ‘ignores as wholly immaterial all questions of notice. I think the rule which applies to one dealing with a thief should not apply to an innocent person dealing directly with the owner rightfully in possession and without notice * * *’

“I therefore find that defendants received and sold the cattle and accounted to the mortgagor for the proceeds without actual notice of plaintiff’s rights, and in good faith as commission merchants. I conclude as a matter of law that in such circumstances defendants are not liable unless the South Dakota statute gives them constructive notice * * * (which it did not, Judge Scott held).” 10 F. 2d 510, at 512.

The decision of Judge Scott in *Drover’s* governs the case at bar, and supplies us with the rule of law to be applied to it. It may be pointed out that in the usual case in which local law is held inapplicable to a federal suit, it is the United States as plaintiff which profits by the denial of a defense under local law. See, e.g., *D’Oench, Duhme & Co. v. Federal Deposit Insurance Corporation*, 315 U.S. 447 (1943). But the principle of the application of federal law is not in the least affected thereby. What

is sauce for the federal plaintiff as gander ought to be sauce for it when it is the goose.

I therefore conclude that the defendants, auctioneers without notice and innocent of any wrongful intent or of negligence, are not liable to the plaintiff in conversion. With respect to the amount received and retained by the defendants out of the returns of the sales, however, the matter is otherwise. This sum, a commission amounting to \$46.79, or 3% of \$1,526.22, was money received by the defendants for the sale of property owned by the United States and retained by them without authority or permission by the United States. The complaint of the plaintiff states an action for money had and received as to that sum of \$46.79, and it is the order of the court that plaintiff have judgment for \$46.79 plus interest. Plaintiff's other demands for relief are denied.

Dated: February 28th, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed February 29, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled matter having come regularly before me on November 4, 1955, for trial, the plain-

tiff being represented by Lloyd H. Burke, Esquire, United States Attorney, by and through James S. Eddy, Esquire, Assistant United States Attorney, and the defendant being represented by Weis and Weis, Attorneys at Law, by and through Alvin Weis, and evidence both oral and documentary having been adduced, and written arguments having been filed herein, the cause having been submitted for decision, and the Court being fully advised, and good cause appearing therefor, the Court makes and enters its Findings of Fact and Conclusions of Law, to wit:

Findings of Fact

I.

That all of the allegations of the complaint herein are true, except (1) the allegation in paragraph IV of said complaint on page 2, line 25, that defendants acted "wrongfully" when they marketed certain livestock, and (2) the allegation in paragraph IV of said complaint on page 2, lines 26-27, that by marketing said livestock defendants were "thereby converting said livestock to their own use and purposes."

II.

That this Court has jurisdiction herein, pursuant to Section 1345 of Title 28 of the United States Code.

III.

That defendants Henry W. Matthews and Nettie Matthews reside in the above-entitled District and Division; that they conduct a livestock auction busi-

ness in said District and Division under the firm name and style of Yuba City Livestock Auction Company; that they have appeared herein; and that this Court has jurisdiction of the parties and the subject matter of this action.

IV.

That on March 17, 1951, one Wheaton executed a crop and chattel mortgage to the Farmers Home Administration, an agency of the plaintiff; that said mortgage covered farm implements, machinery, and certain livestock and property; that it contained the usual provision that upon default, the mortgagee was entitled to immediate possession of the mortgaged goods; and that said mortgage was duly recorded on March 17, 1951, in Yuba County, California, the county in which Wheaton then resided and in which the property in question was then located.

V.

That prior to November 19, 1951, the plaintiff fully performed all of the acts necessary to record its interest in said chattel mortgage pursuant to California Law.

VI.

That on November 19, 1951, Wheaton defaulted on his obligations to the plaintiff and remained in default from that date until March 2, 1953.

VII.

That during the period in which he was in default, November 19, 1951, to March 2, 1953, Wheaton

fraudulently removed, from time to time, certain of the livestock mortgaged to plaintiff and took them to Sutter County, California, where the defendants' business is located; that Wheaton there had defendants sell the livestock at auction in the regular course of their business and turn the proceeds, less commission, over to him; and that defendants did so, after obtaining Wheaton's signed assurance and warranty that the animals were free and clear of all liens or other encumbrances, including mortgages.

VIII.

That said Yuba County and said Sutter County are adjacent counties in the State of California.

IX.

That defendants sold the animals for a total of \$1,526.22; and that from this sum, they subtracted their regular sales commission of 3% (which amounted to \$46.79), plus all expenses of the sale, and turned the net proceeds over to Wheaton.

X.

That defendants did not have knowledge of plaintiff's claim or interest in the livestock at any time during the relevant period.

XI.

That during the relevant period, and at all times since, Wheaton was indebted to the plaintiff in an amount exceeding \$1,526.22; that plaintiff has never consented to the sale of the livestock in question or

released its lien on said livestock; and that no part of the proceeds of the sale of said livestock has been paid to plaintiff by Wheaton or by defendants.

Conclusions of Law

I.

That, by the sale of the livestock without the consent of the plaintiff, the Mortgagor tortiously converted said livestock to the damage of plaintiff in the sum of \$1,526.22.

II.

That the defendants were the agents of said Mortgagor in the sale of said livestock.

III.

That prior to said sales, defendants had no constructive knowledge or notice of the existence of said mortgage.

IV.

That pursuant to the law of the State of California, the defendants would be liable to the plaintiff for the sum of \$1,526.22.

V.

That the law applicable to this action is not the local law, but the Federal Common Law.

VI.

That the defendants are not liable to the plaintiff for the conversion of said livestock in the sum of \$1,526.22, but are liable to the plaintiff for money

had and received by them to the use of the plaintiff in the sum of \$46.79.

Done in open court this 9th day of May, 1956.

/s/ EDWARD P. MURPHY,
Judge of the District Court.

Approved as to form:

.....,
Attorney for Defendants.

Lodged April 24, 1956.

[Endorsed]: Filed May 11, 1956.



In the District Court of the United States for the Northern District of California, Northern Division

Civil No. 7124

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENRY W. MATTHEWS and NETTIE MATTHEWS, Doing Business Under the Firm Name and Style of YUBA CITY LIVESTOCK AUCTION COMPANY,

Defendants.

JUDGMENT

The above-entitled matter having come regularly before me on November 4, 1955, for trial, the

plaintiff being represented by Lloyd H. Burke, Esquire, United States Attorney, by and through James S. Eddy, Esquire, Assistant United States Attorney, and the defendant being represented by Weis and Weis, Attorneys at Law, by and through Alvin Weis, and evidence both oral and documentary having been adduced, and written arguments having been filed herein, the cause having been submitted for decision, and the Court being fully advised, and good cause appearing therefor;

It Is Therefore Ordered, Adjudged and Decreed that the plaintiff shall hereby have judgment against the defendants and each of them in the sum of \$46.79.

Done in open Court this 10th day of May, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

Lodged April 24, 1956.

[Endorsed]: Filed and entered May 11, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America by and through Lloyd H. Burke, United States Attorney for the Northern District of California, and James S. Eddy, Assistant United States Attorney for said District, hereby appeals to the United States Court of Appeals for the Ninth Cir-

cuit, from the Findings of Fact and Conclusions of Law and Judgment entered in the above-entitled action on May 11, 1956.

Dated: July 6, 1956.

LLOYD H. BURKE,
United States Attorney,

By /s/ JAMES S. EDDY,
Assistant U. S. Attorney.

[Endorsed]: Filed July 6, 1956.

[Title of District Court and Cause.]

ORDER

Good cause appearing therefore;

It Is Ordered that time within which the appellant hereto may docket his appeal is extended to include September 4, 1956.

Done in open court this 15th day of August, 1956.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed August 15, 1956.

In the District Court of the United States for the
Northern District of California, Northern Division

No. 7124

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY W. MATTHEWS and NETTIE MAT-
THEWS, Doing Business Under the Firm
Name and Style of YUBA CITY LIVE-
STOCK AUCTION COMPANY,

Defendants.

Before Hon. Edward P. Murphy, Judge.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff:

JAMES S. EDDY, ESQ.,

Assistant United States Attorney.

For the Defendant:

ALVIN WEIS, ESQ.

Friday, November 4, 1955

The Clerk: Case No. 7124, U. S. v. Matthews,
trial by Court.

Mr. Eddy: Ready for the Plaintiff.

Mr. Weis: Ready for the Defendant.

The Court: You may proceed, gentlemen. I have

not had an opportunity to examine the pleadings, but they do not appear to be involved.

Mr. Eddy: If I could take a moment to go over them, your Honor, perhaps that would help all of us.

Your Honor, this is a complaint for conversion of certain property which was mortgaged by a third party to the Government and then sold by the defendants, an auction company, at the time the mortgage was in effect and the Government had the right to immediate possession of the property.

An answer was put in and then the answer was amended, and my analysis of the pleadings indicates that there is very little in the complaint which is at this time denied.

Now I believe paragraphs 1 and 2 of the complaint are admitted. Is that right, counsel? Paragraphs 1 and 2 are admitted in the answer?

Mr. Weis: I think that is right, Mr. Eddy. Just a moment and I will check. Yes, that is correct. [2*]

Mr. Eddy: Paragraph 3 is admitted except for one phrase which is denied by way of its legal effect.

Mr. Weis: We will admit that the mortgage contained the provision alleged, but we deny that it is effective.

Mr. Eddy: Well, that is a matter of proof.

The Court: All right, let's proceed with the evidence.

Mr. Eddy: Paragraph 4 is substantially admitted as well, except for one phrase. We will proceed with the evidence. I do not think it is too complicated, your Honor.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Weis: Does the Court understand the succeeding—

The Court: Well, I understand that you filed—is it two amended answers?

Mr. Weis: No, just one.

The Court: Just one.

Mr. Weis: Just the one amended answer.

Mr. Eddy: Paragraph 4 is admitted except for line 24, the first phrase, which says, “Which livestock was covered by said mortgage,” isn’t that right?

Mr. Weis: Well, yes; of course, we deny any conversion.

Mr. Eddy: Yes.

The Court: All right, let’s take the testimony, gentlemen. I do not want to be captious or vexatious, but I have to get back to San Francisco and I want to try this [3] case as expeditiously as possible.

Mr. Eddy: May Mr. Young sit here at the counsel table?

The Government will call Mr. Wheaton.

Mr. Weis: If the Court please, I would like to have Mr. and Mrs. Matthews, the defendants, come up here and sit with me.

The Court: Yes, all right.

ALLEN W. WHEATON

called for the plaintiff, sworn.

Direct Examination

By Mr. Eddy:

Q. Mr. Wheaton, you have given us your name. What is your address, please?

A. Route 1, Box 660, Marysville.

Q. How long have you lived at that address?

A. About nine years.

Q. I hand you two documents, Mr. Wheaton. Do you recognize them? A. Yes.

Q. Do those two documents constitute a mortgage which you executed to the Government of the United States? A. Yes.

Mr. Weis: We will stipulate that they do, if your Honor please. [4]

Mr. Eddy: Very well. They are offered as Plaintiff's Exhibits 1-A and 1-B, your Honor.

The Court: They will be received in evidence and the stipulation will be accepted.

(The documents referred to were marked Plaintiff's Exhibits 1-A and 1-B.)

Q. (By Mr. Eddy): Now you executed this chattel mortgage on the 17th of March of 1951, isn't that correct?

A. The exhibit will speak for itself.

Q. Is that the date on these documents?

A. Well, the original mortgage was in 1947, I think.

Q. What was your answer?

(Testimony of Allen W. Wheaton.)

A. The original mortgage was made out in 1947.

Q. You have had other mortgages before, haven't you?

A. Yes. This is a renewal of the old mortgage, isn't it?

Q. I am referring to the date that you executed this document right here (exhibiting to witness).

A. That is the date.

Q. What is that date, please?

A. 17th day of March.

Q. And the year? A. 1951.

Q. All right. And you mortgaged livestock among other things in that mortgage, did you not? [5] A. Yes.

Q. Is there a list of the livestock there?

A. Yes.

Q. All right. Now referring to paragraph Roman numeral II, sub 4, on the back page, will you read that, please? A. Roman numeral II?

Q. I am referring to sub-paragraph 4, right here (indicating).

A. "All livestock, farm equipment, machinery, tools and other farm personal property now owned, or which may hereby be acquired by the mortgagee during the time this mortgage is effective."

Q. Does it say "hereby" or "hereafter"?

A. "Hereafter."

Q. Then this mortgage covered all your livestock, didn't it? A. Yes.

Q. Now after you entered into this mortgage on the 17th day of March, 1951, did you sell any live-

(Testimony of Allen W. Wheaton.)

stock through the Yuba City Livestock Auction Company? A. Yes.

Mr. Eddy: Your Honor, I believe the pleadings admit that the Yuba City Livestock Auction Company handled these animals. I am not going to ask him that.

The Court: I have seen that. [6]

Q. (By Mr. Eddy): Mr. Wheaton, calling your attention to the complaint in this case, the list appended to paragraph 4 thereof, I will ask you if you sold those animals through the Yuba City Livestock Auction Company? A. Yes, I did.

Q. And did you receive the money that is shown there? A. I did.

Q. Now did the Government of the United States consent to any of those sales enumerated there?

A. No. The only thing, I didn't figure that they belonged to the Government. I bought the pigs myself and I figured they were mine and I got rid of them. They were other pigs than the ones that are put on the mortgage.

Q. Let me see, your answer is—is there some cows in there and some pigs?

A. Yes, two cows.

Q. And those cows were the ones that were described——

A. They were mortgaged property, yes.

Q. They were mortgaged? A. Yes.

Q. All right. Now where did the pigs come from that you sold?

A. I bought them, 42 of them.

(Testimony of Allen W. Wheaton.)

Q. You bought 42 pigs. Did you buy them after you executed this mortgage to the Government? [7]

A. Yes.

Q. And you kept them on your ranch for a while, did you?

A. I bought them after I made this deal with Fritz Ruff.

Q. You also bought them after you made the deal with the Farmers Home Administration, did you not?

A. Yes, I imagine.

Q. And were they on your ranch for a while?

A. For a while, yes.

Q. And then you took them down to the Yuba City Livestock Auction Company and sold them, is that right?

A. Yes. I figured since he was furnishing the feed and so forth they would be more apt to belong to Ruff than to the Government, I would say. He was hauling the feed in every morning and he made the deal, and I figured they would be more apt to belong to him, I thought.

Mr. Eddy: Well, I will ask that that go out.

A. The Government wasn't furnishing any feed for them, and there was no feed there for them.

Mr. Eddy: I will ask that that go out, that latter part.

The Court: It may go out as a volunteer statement of the witness.

Q. (By Mr. Eddy): Well, now, the animals that you had in your possession at the time you

(Testimony of Allen W. Wheaton.)

made the mortgage were kept on your ranch, were they not? [8] A. Yes.

Q. And what did you do with the animals that you acquired after you entered into the mortgage with the United States? Did you put them on your ranch, too?

A. I don't know what you mean. The 42, I told you I bought them, I bought them out there.

Q. And they were just mixed in with the animals you had at the time you executed the mortgage?

A. Yes. That is, they were Ruff's pigs.

Q. How about the 42 pigs?

A. The 42 pigs is what I am talking about. They were mixed in with Ruff's pigs.

Q. How about the animals that you had at the time you executed the mortgage?

A. Well, the four cows, I took them and sold them and gave the money to the FHA. I believe there is one stag there I sold that belonged to the Government.

Q. Well, now, you didn't give the money to the FHA concerning any of the animals that are described in the complaint, did you? A. No.

Q. You just kept that, didn't you?

A. Those four sows that were mortgaged, I took and sold them and gave them the money.

Q. You are referring to four sows that were in the [9] original mortgage? A. Yes.

Q. All right. Now around the 1st of November, 1951, you entered into an agreement with Mr. Ruff, did you not? A. Yes.

(Testimony of Allen W. Wheaton.)

Q. And what was the nature of that agreement?

A. Well, he had the pigs out there and he was supposed to get—well, the agreement was he was supposed to get two-thirds of the money I made off of them.

Q. Well, how many hogs were involved?

A. 120.

Q. And where were they when the agreement was made? A. They were on Mr. Ruff's place.

Q. All right. And then were they transported to your place? A. By truck, yes.

Q. Who transported them? A. Mr. Ruff.

Q. And what was the purchase price of these hogs? A. \$7,500.

Q. And how was that paid?

A. It was supposed to be paid out of what I made off the sale of the hogs.

Q. Now did you execute a note and chattle mortgage concerning those hogs? [10] A. Yes.

Q. All right. Was that recorded on the 5th of November?

A. Well, it was made out on the 1st. I don't know exactly when it was recorded. I didn't record it.

Q. All right, now, concerning these animals in the complaint, are any of these animals Ruff's animals, or all these the 42?

A. Those are the 42 hogs that I bought.

Q. Is it your testimony that none of the animals described in this complaint were animals which you obtained under the Ruff deal?

(Testimony of Allen W. Wheaton.)

A. Well, no, because the agreement, after I read it over, I imagine they took over anything I brought over. It was the mortgage——

Mr. Weis: I didn't get the answer.

Mr. Eddy: Well, I will ask that everything after the word "no" go out as a voluntary statement as to the law, your Honor.

The Court: That may go out.

Mr. Eddy: You may cross-examine.

Cross-Examination

By Mr. Weis:

Q. Mr. Wheaton, Mr. Eddy, the Government attorney, has asked you with reference to your deal with Mr. Fritz Ruff. Now I will show you a document purporting [11] to be a contract for sale and purchase of a herd of hogs dated November 1st, 1951. I want you to examine that document, examine the signatures, and tell me if that is your signature and if that is the agreement.

A. That is my signature.

Q. All right.

A. I have one like that.

Q. You have a copy? A. Yes.

Q. And that is the original agreement?

A. That is the original agreement.

Mr. Weis: I will ask that this be introduced in evidence.

Mr. Eddy: The Government has no objection to its admission. The materiality is something that the

(Testimony of Allen W. Wheaton.)

Government would like to argue when the time arrives.

The Court: Let it be received in evidence.

(The document referred to was marked Defendants' Exhibit A.)

Q. (By Mr. Weis): Now, at the same time that that agreement was entered into and as a part of the same transaction you have already testified that you gave Mr. Ruff a mortgage on the hogs, is that right? A. Yes.

Q. And I will show you what purports to be the [12] original chattel mortgage, and I want you to examine the signature. Tell me, is that the mortgage which you gave to Mr. Ruff? A. Yes.

Q. It is. Is that your signature? A. Yes.

Mr. Weis: I will ask that the chattel mortgage, if your Honor please, be introduced in evidence and marked with the appropriate number.

The Court: So ordered.

(The document referred to was marked Defendants' Exhibit B.)

Q. (By Mr. Weis): Now, when you entered into that contract and signed that mortgage did you make any payment on account of the purchase price of the 120 hogs? A. No.

Q. In other words, the entire purchase price was incorporated in the agreement, is that right?

A. Yes.

Q. And secured by the chattel mortgage. Now,

(Testimony of Allen W. Wheaton.)

in the Government's complaint your place is described as the northeast quarter of the northeast quarter of Section 30, Township 15 north, Range 3 east, lying about 7 miles northeast of Marysville. Is that your home? A. That is my home. [13]

Q. Is that the only property that you farmed and operated during the period that we are talking about, commencing in March of 1951?

A. Yes.

Q. Your farming operations and your stock growing has been confined to that one place?

A. Yes.

Q. And that is the same property that is described in the Ruff contract, the northeast quarter of the northeast quarter of that same section 30?

A. Yes.

Q. When you made the deal with Mr. Ruff where did you take the 120 hogs that you got from him? A. On that property described.

Q. On that property. And when they were delivered at your place did you commingle them with the hogs that you already had there? A. Yes.

Q. They were just all put out together, is that it? A. Yes.

The Court: Now, wait, I can cut this very short. You knew, did you not, Mr. Wheaton, you understood the terms which were set forth in this crop and chattel mortgage of the United States Department of Agriculture, didn't you? [14]

A. Well, I didn't know too well. I was dumb, I guess.

(Testimony of Allen W. Wheaton.)

Q. Well, you knew enough about it to borrow \$1861.42, didn't you? A. Yes.

Q. And you knew the amount of cattle and other livestock that you were getting under the terms of that mortgage, did you not? A. Yes.

Q. Did you say anything about that to these people when you sold it to them?

A. Well, I didn't know they were going to make out a mortgage on the place, as far as that is concerned.

Q. You didn't know what?

A. I didn't know that they were going to make out—I thought they were making a mortgage on the hogs. That is what I thought.

Q. That isn't an answer to my question. My question is did you tell these people that you held these livestock under a mortgage from the United States Government? A. No.

Q. You didn't tell them that? A. No.

Q. They didn't know anything about it?

A. No.

The Court: That is your case, gentlemen. [15]

Mr. Eddy: I didn't understand your Honor.

The Court: I said that is the case.

Mr. Eddy: Well, to be perfectly candid, your Honor, and I am sure counsel knows this, too, this man was prosecuted criminally, and one of the features——

The Court: I am not going to sit here and waste this Court's time with a case of this kind, Mr. Eddy. If anybody should be prosecuted it is Wheaton.

(Testimony of Allen W. Wheaton.)

Mr. Eddy: Well, Wheaton was the man who was prosecuted, but here is the point, your Honor: The sale of hogs and livestock for which the Government is charging the auction company are not the livestock that were under the Ruff contract deal. Otherwise——

The Court: It makes no difference to me. I am going to assume that the defendants here are telling the truth. They went into this as an honest deal. Is that going to be your defense?

Mr. Weis: It certainly is, your Honor.

The Court: I can certainly appreciate that that is what it is going to be, and I am certainly not going to hold these defendants responsible under a situation of this kind. I am not going to do it. If you have any technical defense that you want to bring up—I am putting you on the defensive now, Mr. Eddy.

Mr. Eddy: Well, your Honor, this is a case [16] of conversion, on which there is a good deal of law that I would like to——

The Court: All right, then, well, you submit it. I will take the matter under submission. I don't want to hear any further testimony. I am going to assume your defense as I have indicated.

Mr. Weis: Very well, your Honor.

Mr. Eddy: I don't understand that.

The Court: I have assumed your defense correctly, have I not?

Mr. Weis: Oh, correctly, yes, your Honor. The thing about it is this: We represent a livestock

(Testimony of Allen W. Wheaton.)

auction company situated in Yuba City, which, I would like to call to your Honor's attention, is located in a different county from where Mr. Wheaton lives and where the hogs were kept. Now on certain days certain pigs and hogs and cattle were presented at our auction yards for sale, and I have the sales slips for introduction if your Honor needs them, signed, every one of them, by Mr. Wheaton, in which he warranted to the auction yard that the stock was free of any mortgages or liens and could be legally sold.

Mr. Eddy: May I interject one comment? Your Honor, this man Ruff who we are talking about, who was wronged by this man, is not a defendant in this case.

The Court: I understand that. [17]

Mr. Eddy: I thought for a moment you didn't.

The Court: Oh, no, no, no, I understand that. I have been glancing over these pleadings during the course of your interrogation of this witness. I am very familiar with the pleadings. Fortunately I have a capacity to read quickly. I have read your pleadings and I have read the amended answer, and I have also read, so I may particularize it, the Defendants' Exhibit A.

Mr. Eddy: That concerns animals which are not in issue here.

The Court: How is an auction company going to differentiate between hogs?

Mr. Eddy: Well, there is law, your Honor,

(Testimony of Allen W. Wheaton.)

which shows—I have good law that I wish to submit.

The Court: I don't care how good it is——

Mr. Weis: We have better law to the contrary, your Honor.

Mr. Eddy: Conversion requires no intent, your Honor.

The Court: Oh, I know that; I went through that in law school 30 years ago.

Mr. Eddy: We can frame the issues, I think, very quickly.

The Court: Let's frame the issues and then you can prove them. [18]

Mr. Eddy: Very well.

The Court: But I am indicating to you right now, Mr. Eddy, that you have got a very, very difficult row to hoe in asking me to give the Government judgment in this matter.

Mr. Weis: May I say just this, if your Honor please and Mr. Eddy: One question I think probably should either be testified to by somebody or stipulated, and that is the matter of credits. Now, you haven't as yet——

Mr. Eddy: Well, I don't understand what you mean.

Mr. Weis: Well, payments that you have received on account.

Mr. Eddy: Oh. Well, yes; I was going to put Mr. Young on to establish that.

Mr. Weis: If we might have in the record the amount of payments made so that the——

(Testimony of Allen W. Wheaton.)

The Court: Well, let's put it in the record.

Mr. Eddy: May I ask this witness one more question?

The Court: Surely; you can take all the time you want.

Q. (By Mr. Eddy): Mr. Wheaton, your mortgage to the Government, is it not true—May I ask a leading question?

The Court: Let's hear the question.

Q. (By Mr. Eddy): Calling your attention to paragraph [19] 4 of the complaint again, you see a number of sales, and starting with 11-19-51 and ending 3-2-53. Were you or were you not in default of your contract with the Government during that period of time?

Mr. Weis: Now I think we will have to object to that, if your Honor please, as calling for the witness' conclusion.

The Court: Overruled.

Q. (By Mr. Eddy): Were you behind in payments? A. Yes.

Q. You were? A. Yes.

Mr. Eddy: I have no further questions of this witness, your Honor. You may step down, unless you have further questions of this witness.

Mr. Weis: Well, in view of his Honor's remarks I will not pursue the cross-examination any further.

Mr. Eddy: Mr. Young, will you take the stand?

The Court: A very wise procedure, Mr. Weis.

JUNE YOUNG

called for the plaintiff; sworn.

Direct Examination

By Mr. Eddy:

Q. Mr. Young, what is your address?

A. 218 El Monte Street, Yuba City. [20]

Q. And your occupation, please?

A. I am the County Supervisor for the Farmers Home Administration.

Q. And that is the agency which made the loan which this case is about? A. That is right.

Q. Do you have with you the records and file on Mr. Wheaton?

A. Yes, this is the county office docket.

Q. And how long have you had custody of the records there?

A. I have only been in Yuba City since September 12th of this year.

Q. You are the custodian of those records, are you not? A. Yes.

The Court: Let the records be introduced. I will assume he has produced them in his official capacity——

Mr. Eddy: Oh, very well.

The Court: ——and the Court will order the records to be introduced in evidence.

Mr. Eddy: Very well, your Honor.

(The documents referred to were marked as Plaintiff's Exhibit No. 2.)

Q. (By Mr. Eddy): You have examined these

(Testimony of June Young.)

records, have you not? [21] A. Yes, sir.

Q. Do the records reveal whether or not any consent was given by the Government for the sale of these animals listed in the complaint?

A. No, sir, not of the animals listed on this complaint.

Q. Was there a release and consent given concerning any other animals?

A. Yes, sir; on March 6th—on April 6th, pardon me, 1953, a release was given on four sows.

Q. And how much money was received by the Government in connection with that sale?

A. The sale amounted to \$173.95. The Government received all of it.

Q. And was the defendant given credit for that sum on the books?

A. Yes. A copy of the receipt is in the docket. Mr. Weis: What was the last answer?

A. They were, yes, sir.

Q. (By Mr. Eddy): Was the defendant in default for the period November 19, 1951, to March 2nd, 1953? A. Yes, sir, he was.

Q. And what is the total amount owed, principal and interest, by the defendant at this time?

A. According to the statement of billing received from the area finance office, principal amount of \$1861.42 and [22] interest balance of \$106.42.

Q. Have there been any payments made since that time?

A. Mr. Wheaton brought a check in, or, rather,

(Testimony of June Young.)

the auction yard brought a check in for approximately, I am not sure of the figure, \$218.

Mr. Weis: Do you have that?

Mr. Matthews: That is the one that was lost; the Farmers Home Administration lost it and we gave them a duplicate.

Q. (By Mr. Eddy): Could that have been \$228.35? A. Yes, sir, it could have.

Q. You don't have any record of that in the records, but that is something you know of your own knowledge?

A. I know that because I took the check down to Mr. Wheaton to endorse.

Q. And that has been since this six-month semi-annual audit of the account?

A. That is since this bill came out. The billing is dated as of October 11, 1955, and the material on this billing accumulated prior to that. This last payment wouldn't show on it.

Mr. Weis: There is another one, \$315.12.

Mr. Eddy: No further questions. You may cross-examine, Mr. Weis. [23]

Cross-Examination

By Mr. Weis:

Q. Mr. Young, the \$1861.42 is the original loan, is it not? A. No, sir, it isn't.

Q. Well, let me call your attention to the starting sentence in the mortgage, "to secure the sum of \$1861.42," March 17, 1951.

(Testimony of June Young.)

A. I think that would be the amount of the outstanding balance at the time the mortgage was written up. The original note shows \$2,015——

Q. Oh, I see.

A. ——to be the original loan.

Q. Well, all right. Now that is stated right in the mortgage also, is it not?

A. Yes, sir, this \$1861.42——

Q. Is the balance due on that \$2,015 note?

A. That is right.

Q. And that is the amount that you had coming to you——

A. At the time the mortgage was made.

Q. ——at the time the mortgage was made?

A. Yes, sir.

Q. All right. Now, the mortgage provides for additional advances not in excess of \$500 which might be advanced by your organization to provide feed? A. Yes, sir. [24]

Q. Now can you tell me whether or not you ever made such advances?

A. Not having been more familiar with the docket than I am I couldn't tell you without looking.

Q. Well, do your records show any advances?

A. What was the date of the mortgage, sir?

Q. March 17, 1951.

A. '51. No, sir; I don't see any——

Q. No advances? A. No more advances.

Q. All right. Now what is the rate of interest on that note?

(Testimony of June Young.)

A. Five percent on the unpaid balance.

Q. Five percent. And that is running since March 17, 1951?

A. Yes, sir.

Q. Now you have testified to one payment of one hundred seventy some odd dollars which you received. That was for stock that went through the Yuba City Auction Company, was it not?

A. That is my understanding.

Q. All right. I want to show you from the check book of the Yuba City Auction Company another check written to Mr. Wheaton and the Farmer Home Administration for \$228.35 on August 29—that is this year, is it not—August 29, 1955. Now will you take a look at that? [25]

A. I think this is that last check that I had Mr. Wheaton endorse and sent into our regional attorney.

Q. Well, have you given Mr. Wheaton credit on your books for that?

A. Mr. Wheaton would be given credit on our area finance office records, although that payment went in after this billing was sent to the county office.

Q. Then you admit that the payment was made?

A. Yes, sir.

Q. It has been sent to your office, all right. Now will you look at another checkbook of Yuba City Livestock Auction Company, and I call your attention to another check that is made payable to A. W. Wheaton and the Farmers Home Administration in the sum of \$315.12.

(Testimony of June Young.)

Mr. Eddy: What is the date of that.

Mr. Weis: That is November 22, 1954.

Mr. Eddy: What is the amount, 315 what?

Mr. Weis: November 22, 1954.

Mr. Eddy: That is the date. And the amount?

A. \$315.12.

Mr. Eddy: May I interrupt a moment: Is it your contention that that amount was paid?

Mr. Weis: Yes.

Mr. Eddy: Do you have a cancelled check?

Mr. Weis: The check never came back yet. [26]

The Court: May I interject to say that I don't see the purpose of this cross-examination.

Mr. Weis: Well, without this in, if your Honor's trend of thought should change, without this evidence in there would be nothing in the record to indicate but what the entire amount is due.

The Court: You are not disputing that the Government made the loan to Wheaton, are you?

Mr. Weis: No, not at all.

Mr. Eddy: I think I understand it, your Honor. As I understand it, if the Government is to recover it should not recover more than what is owed by Mr. Wheaton, even though the conversion was for a greater sum.

The Court: That was plain to me fifteen minutes ago. I understand that.

Mr. Weis: If it may be stipulated that these three payments have been made and received by the Farmers Home Administration, that is all I am trying to prove, and you people haven't got those payments on your records.

Mr. Eddy: Yes, we have two of them. The 315 is the only one we don't have.

Mr. Matthews: That was November, 1954.

Mr. Weis: Well, that was written a year ago.

Mr. Eddy: And you haven't got the check back, apparently. [27]

The Court: This Court is not required to spend its time in an idle act. If you are willing to stipulate that the testimony that may be given by—what is their name, the Ruff people? Is that the name of your client, Ruff?

Mr. Weis: Mr. and Mrs. Matthews.

The Court: If you are willing to stipulate that that is the testimony, then you gentlemen can go into the confines of your offices and brief it and submit it to me and I am going to render my decision, and I assure you it will be a voluble one, because I am going to express myself on this. I think it is perfectly ridiculous for the Government to pursue the prosecution of a case of this character. I am not criticising you, Mr. Eddy, I know that you have to take your orders, but I don't that this is the kind of case that should be brought to the United States District Court.

Now unless you can convince me to the contrary—my mind is open—I am ready to get out of here and go back to San Francisco and attend to more important affairs.

Mr. Eddy: I understand that, your Honor, but is there anything further on the balance due that you want to put in?

Mr. Weis: Well, if I may have your stipulation

that at least those three payments were made, because we made them, and it begins to look like all the money you [28] ever collected on this mortgage Matthews collected it for you and turned it over to you.

The Court: That is the way it looks to me.

Mr. Weis: Now may I have your stipulation in regard to those three payments? As I say, there may have been others; we don't seem to get anywhere in ferreting into this thing, but I know there are those three.

Mr. Eddy: I will stipulate that those three payments were made——

Mr. Weis: Very well.

Mr. Eddy: ——however, I believe that Mr. Young's records show that he was given credit—as to the balance he just announced he was given credit for them, or at least two of them.

Mr. Weis: You are suing for \$1,526. Now certainly you could not recover under any circumstances for more than was owing to you.

Mr. Eddy: That is correct.

Mr. Weis: Now you start with a mortgage of \$1861.

Mr. Eddy: And there was never enough money paid to reduce the principal amount.

The Court: You left out the 42 cents.

Mr. Weis: And 42 cents, and we have collected and paid to you some seven or eight hundred dollars. [29]

Mr. Eddy: All right; four years old at five per cent, that is 20 per cent.

Mr. Weis: All right, what is one-fifth of—

The Court: Hasn't the Government of the United States more important problems on its hands and haven't I, as a United States Judge, more important problems than a suit for \$1,500 in a situation of this character?

Mr. Eddy: I regret to say, your Honor, that I have brought some actions for considerably less than \$1500.

The Court: You wouldn't bring them before me.

Mr. Weis: Now if your Honor please, and Mr. Eddy, before we close, could I have your additional stipulation to the effect that your mortgage was not recorded in Sutter County? We talked about that on previous occasions.

Mr. Eddy: I will so stipulate, but it was recorded in Yuba County, which is where the ranch was and where the man lived.

Mr. Weis: It shows on its face that that was done.

Mr. Eddy: Yes. Well, now, your Honor, may I briefly state what I believe to be the issues in this case?

The Court: Certainly, that is your privilege and your duty.

Mr. Eddy: Your Honor, I believe that the Government has shown, and if not I am sure that counsel will stipulate, that Mr. Wheaton entered into a mortgage agreement with the United States; that the mortgage agreement covered certain [30] livestock, and that it had an after-acquired prop-

erty clause in it; that Mr. Wheaton acquired 42 hogs from somewhere—not from Mr. Ruff, though—and he sold some cows that were on the agreement, some after-acquired hogs, through the defendants here, and that they handled the transaction.

Now there is nothing that the Government knows of to indicate that the defendants knew that these hogs were mortgaged to the Government.

I want to furthermore add that the evidence shows that the man was in default and was entitled to the immediate possession of these animals because of the borrower being in default.

So Wheaton sold to the Yuba City Livestock Auction Company, or through them, these various animals to the value of about \$1500.

The Government's position is that that was a conversion of these animals and that the auction company is liable therefore, and the Government feels that the intent of the defendants is not a material matter here, and that is the Government's case.

I have one case exactly in point, a California case, and I have three or four others which I would like to give the Court.

The Court: All right, submit it to me, I will read it. I don't need to hear anything from you, Mr. Weis. I am [31] not going to require any testimony on behalf of the defendants.

Mr. Eddy: Is it your Honor's thought that if there is anything about a purchase mortgage in here that the Ruff mortgage has got anything to do with it?

The Court: I don't think so.

Mr. Weis: I have one comment on some of the testimony that went in. I think that Mr. Wheaton stated in response to a question by Mr. Eddy that he sold the livestock to Yuba City Auction Company and I intended to correct that later on if it had gone any further.

Mr. Eddy: I will stipulate it was through them.

The Court: I know. The Court will take judicial knowledge of the manner in which livestock auctions operate. I know something about livestock. I was born and raised in Nevada. I know how these companies operate. The livestock is just brought into the auction yard and the auction sells them. They are not sold to the auction company, they are just put in there and the auctioneer sells them and gets his percentage, is that right?

Mr. Weis: Three per cent in this case.

Mr. Eddy: But I believe under the law the auctioneer is considered to be the agent of the seller. There are some authorities to that effect which I would like to present to the Court. [32]

Mr. Weis: If Mr. Eddy presents points and authorities may I have an opportunity to reply?

The Court: Whatever time you want.

Mr. Eddy: May I have your stipulation that at the conclusion of this case the Government file which has been admitted here may be returned to the department of the Farmers Home Administration?

Mr. Weis: That is satisfactory, and may I likewise have your stipulation that Mr. Fritz Ruff's

documents may be returned to him? Those are the originals and I have photographic copies.

Mr. Eddy: They may be returned right now if you want to photostat them.

The Court: That will be the order.

Mr. Weis: I have photostatic copies of them.

The Court: All right, the matter will stand submitted, gentlemen. I am going to be on the Circuit Court on the 16th of the month and on the 17th I leave for Portland, Oregon, and will be there for the rest of the month of November and all of December, with exception of the holidays, when I will return home. So this is a matter of no immediate moment. You can take all the time you want, Mr. Eddy, and you, Mr. Weis.

Mr. Eddy: Very well, your Honor.

The Court: Don't let it be too long, though. [33]

Mr. Eddy: I intend to do it while I am still thinking about it, your Honor, so it will probably be next week.

Mr. Weis: It is probably the same here, so we will have the——

The Court: The matter will stand submitted then as of the date the final brief is filed.

Mr. Eddy: With counsel's consent I will substitute this photostat for one of the documents, Plaintiff's 1-A, I believe.

Mr. Weis: Thank you.

Mr. Eddy: Thank you, your Honor.

The Court: The Court will be at recess.

Certificate of Reporter

I, Clarence F. Nyler, Official Reporter, certify that the foregoing 34 pages, comprise a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to type writing, to the best of my ability.

[Endorsed]: Filed November 1, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk, of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated.

Complaint.

Amended answer.

Opinion.

Findings of fact & conclusions of law.

Judgment.

Notice of appeal.

Statement of points to be relied upon on appeal.

Designation of the record on appeal.

Order extending time to docket appeal.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 29th day of August, 1956.

C. W. CALBREATH,
Clerk.

By /s/ C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 15245. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Henry W. Matthews and Nettie Matthews, doing business under the firm name and style of Yuba Livestock Auction Company, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: August 30, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15245

UNITED STATES OF AMERICA,

Appellant,

vs.

HENRY W. MATTHEWS and NETTIE MATTHEWS, Doing Business Under the Firm Name and Style of Yuba City Livestock Auction Company,

Appellees.

APPELLANT'S STATEMENT OF POINTS TO
BE RELIED UPON ON APPEAL

The Appellant designates the following points as the points upon which it intends to rely upon appeal in the above-entitled matter, to wit:

1. The District Court erred in holding that, under Federal Law, appellees were not liable in conversion to the United States for the value of the livestock, mortgaged to the Farmers' Home Administration, which they sold without the consent of the Farmers' Home Administration.

2. The District Court erred in holding that the liability of appellees was limited to the amount of the commission they received for the sale of the mortgaged livestock.

3. The District Court erred in not entering judgment for the United States in the amount of

\$1,526.22, the market value of the mortgaged livestock which they sold without obtaining the consent of the mortgagee, Farmers' Home Administration.

Dated: Sept. 21, 1956.

LLOYD H. BURKE,
United States Attorney;

By /s/ JAMES S. EDDY,
Assistant U. S. Attorney.

[Endorsed]: Filed September 24, 1956.

